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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 OSWALDO ENRIQUE TOBAR, et al.,
12 Plaintiffs,
13 vs.
14 UNITED STATES OF AMERICA,
15 Defendant.

CASE NO. 07cv817 WQH (WMc)

ORDER

HAYES, Judge:

16 The matters before the Court are: (1) the Motion to Dismiss for Lack of Jurisdiction
17 Over Subject Matter (Doc. # 31) filed by Defendant United States, (2) the Motion to Strike
18 Motion to Dismiss for Lack of Jurisdiction Over Subject Matter (Doc. # 36) filed by Plaintiffs,
19 (3) the Motion for Leave to File Second Amended Complaint (Doc. # 39) filed by Plaintiffs,
20 (4) the Motion for Leave to File Supplemental Response to the Motion to Dismiss (Doc. # 44)
21 filed by Plaintiffs, and (5) the Ex Parte Motion for Leave to File Excess Pages for Reply
22 Memorandum to the Motion to Dismiss (Doc. # 45) filed by Defendant.

23 **Background**

24 On January 4, 2007, Plaintiffs initiated this action by filing a complaint in the United
25 States District Court for the Southern District of Texas (Doc. # 12). The complaint alleges that
26 Plaintiffs are residents of Ecuador. *Complaint*, p. 2. The complaint alleges that on October
27 5, 2005, in international waters off the coast of Ecuador, the United States Coast Guard Law
28 Enforcement Detachment (“Coast Guard”), which is owned and operated by the United States,

1 unlawfully and negligently “stopped, searched, arrested, detained and imprisoned the Plaintiffs,
2 seized the boat [and] destroyed the cargo and fish owned by Plaintiffs.” *Id.* The complaint
3 alleges that this incident arose out of suspicion that Plaintiffs were possessing and smuggling
4 drugs. *Id.* The complaint alleges that the Coast Guard acted carelessly, recklessly, negligently,
5 or intentionally during the incident, and caused injury to Plaintiffs and their vessel. *Id.* at 3.
6 The complaint alleges that this action “arises in part” under the Federal Tort Claims Act
7 (“FTCA”), 28 U.S.C. §§ 1346(b) and 2661, *et seq.*, the Suits in Admiralty Act (“SAA”), 46
8 U.S.C. §§ 30901-30918, and the Public Vessels Act (“PVA”), 46 U.S.C. §§ 31101-31113. The
9 complaint also alleges that the Coast Guard’s conduct violated “international law”, “treaty
10 obligations with Ecuador”, and Plaintiffs’ rights as protected by the United States Constitution.
11 *Complaint*, p. 3-4.

12 On May 4, 2007, the action was transferred to this Court (Doc. # 1).

13 On January 15, 2008, this Court issued an order dismissing the action for lack of subject
14 matter jurisdiction (Doc. # 27). The Court concluded that Plaintiffs failed to meet their burden
15 of establishing subject matter jurisdiction under the FTCA because the action falls within the
16 admiralty jurisdiction of the federal courts; under the SAA because the discretionary function
17 to the SAA’s waiver of sovereign immunity applies, thereby retaining the United States’
18 sovereign immunity; under the PVA because Plaintiffs failed to demonstrate reciprocity, which
19 is a jurisdictional prerequisite to the waiver of the United States’ sovereign immunity under
20 the PVA; and under the United States Constitution or international law. The Court granted
21 Plaintiffs leave to amend.

22 On February 5, 2008, Plaintiffs filed a first amended complaint (“FAC”) (Doc. # 28).
23 The factual allegations in the FAC are essentially identical to those in the complaint. In
24 addition re-alleging the SAA and the PVA as grounds for this Court’s subject matter
25 jurisdiction, the FAC alleges the following additional grounds for subject matter jurisdiction:
26 (1) “[a] mutual treaty signed by the United States and Ecuador under the United Nations
27 Convention on the Law of the Sea which specifies that each country shall bear the
28 responsibility for any loss or damage caused by their actions in suppressing illicit drug traffic

1 by interfering with innocent passage or for wrongfully boarding vessels,” (2) the Alien Tort
2 Act (“ATA”), 28 U.S.C. section 1350, “where the U.S. District Court has original jurisdiction
3 of any civil action by an alien for a tort committed in violation of the law of nations or a treaty
4 of the United States,” (3) “[a] specific mutual treaty between Ecuador and the United States
5 for use of the Ecuadorian Air Force base facilities at Manta, Ecuador by the U.S. Coast Guard
6 to facilitate drug interdiction, signed by each country November 12, 1999, and still in effect,
7 whereby the United States agrees to be liable for losses and damages that its actions caused in
8 case no illicit drugs were found (like here),” and (4) the International Covenant on Civil and
9 Political Rights (“ICCPR”), “a treaty signed by both countries to remedy conduct which
10 resulted in illegal detention, cruel or in human treatment.” *FAC*, p. 2.

11 On June 5, 2008, the United States filed the Motion to Dismiss for Lack of Jurisdiction
12 Over Subject Matter (“Motion to Dismiss”) pursuant to Rule 12(b)(1) of the Federal Rules of
13 Civil Procedure. The United States moves to dismiss the FAC on grounds that “Plaintiffs’
14 amended complaint fails to provide any basis for a conclusion that sovereign immunity has
15 been waived, or subject matter jurisdiction is present.” *Mot. to Dismiss*, p. 3.

16 On June 20, 2008, Plaintiffs filed the Motion to Strike the Motion to Dismiss (“Motion
17 to Strike”). Plaintiffs contend that “[t]he case law follows the rule that once an answer is filed
18 Rule 12(b) motions are untimely and that answer is an absolute bar to a motion making of any
19 of the enumerated 12(b) defenses.” *Mot. to Strike*, p. 2. Plaintiffs contend that since
20 Defendant has filed a responsive pleading, its Rule 12(b) Motion is improper. *Id.* at 2. On
21 June 24, 2008, Plaintiffs filed a response in opposition to the Motion to Strike (Doc. # 37).

22 On June 26, 2008, Plaintiffs filed the Motion for Leave to Amend Complaint (“Motion
23 to Amend”). Plaintiffs state: “Plaintiffs move the Court for leave to amend their complaint
24 because additional facts have come to light and the pleadings need to match the facts.
25 Plaintiffs ask that the court allow them to amend their complaint as reflected in the attached
26 Plaintiffs’ Second Amended Complaint.” *Mot. to Amend*, p. 1. The Second Amended
27 Complaint (“SAC”) adds the following basis for this Court’s subject matter jurisdiction:
28 “Under 10 U.S.C. 2734, 48 C.F.R. 1.46(b) as payable as incident to non combatant activity of

1 the U.S. Coast Guard.” SAC, p. 3. Except for this additional jurisdictional allegation, the
2 allegations in the SAC are essentially identical to those in the FAC. On July 1, 2008, the
3 United States filed a response in opposition to the Motion to Amend (Doc. # 40).

4 On July 11, 2008, Plaintiffs filed a response in opposition to the Motion to Dismiss
5 (Doc. # 43). On July 15, 2008, Plaintiffs filed the Motion for Leave to File Supplemental
6 Response to the Motion to Dismiss (“Motion to Supplement”). Plaintiffs seek to supplement
7 their response in opposition to the Motion to Dismiss with the affidavit of Leonidas H.
8 Villagran, an Ecuadorian attorney, which Plaintiffs contend “is proof of the necessary
9 reciprocity required to waive sovereign immunity under the Public Vessels Act.” *Mot. to*
10 *Supp.*, p. 1. Villagran attests that under the Ecuadorian Constitution “there is no discrimination
11 against people from other countries, and there is not any restriction to a foreign person to file
12 a lawsuit in our country,” that “[f]oreign persons have the same legal rights to sue in Ecuador,”
13 and that “a foreign person, company or entity is able to file a lawsuit against an Ecuadorian
14 person, company or entity.” *Id.*, Exhibit 1.

15 On July 21, 2007, the United States filed the Ex Parte Motion for Leave to File Excess
16 Pages for Reply Memorandum (“Motion to File Excess Pages”). The United States contends
17 that it “can not adequately respond to the arguments properly contained in the opposition, and
18 those addressing previously unidentified allegations, etc. within 10 pages” because Plaintiffs’
19 opposition “contains numerous pages addressing issues not addressed in the” Motion to
20 Dismiss and “also contains allegations and argument concerning alleged sources of subject
21 matter jurisdiction not previously pleaded.” *Mot. to File Excess Pages*, p. 2. On July 21, 2008,
22 the United States filed a reply to the response in opposition to the Motion to Dismiss (Doc. #
23 46). On July 25, 2008, Plaintiffs filed a response in opposition to the Motion to File Excess
24 Pages (Doc. # 52).

25 Standard of Review

26 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move for
27 dismissal on grounds that the court lacks jurisdiction over the subject matter. Fed. R. Civ. P.
28 12(b)(1). The burden is on the plaintiff to establish that the court has subject matter

jurisdiction over an action. *Assoc. of Medical Colleges v. United States*, 217 F.3d 770, 778-779 (9th Cir. 2000). In resolving an attack on a court's jurisdiction, the court may go outside the pleadings and consider evidence beyond the complaint relating to jurisdiction without converting the motion to dismiss into a motion for summary judgment. *Safe Air For Everyone v. Doyle*, 373 F.3d 1035, 1039 (9th Cir. 2004). Issues regarding subject matter jurisdiction may be raised at any time, even on appeal, by motion or sua sponte by the court. Fed. R. Civ. P. 12(h)(3); *Snell v. Cleveland*, 316 F.3d 822, 826-27 (9th Cir. 2002).

Discussion

I. Motion to Strike Motion to Dismiss

Plaintiffs move to strike the Motion to Dismiss on grounds that the United States has filed an answer in this action and is therefore barred from filing a motion pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. However, issues regarding subject matter jurisdiction may be raised at any time, even on appeal, by motion or sua sponte by the court. Fed. R. Civ. P. 12(h)(3); *Snell*, 316 F.3d at 826-27. The Court concludes that, despite filing an answer in this action, the United States is not barred from filing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Court denies the Motion to Strike.

II. Motion for Leave to File Supplemental Response to the Motion to Dismiss

Plaintiffs seek to supplement their response to the Motion to Dismiss by filing the affidavit of Ecuadorian attorney Villagran. The Court grants the Motion to Supplement, and has reviewed the affidavit of attorney Villagran in deciding the Motion to Dismiss.

III. Ex Parte Motion for Leave to File Excess Pages for Reply Memorandum to the Motion to Dismiss

The United States moves the Court for leave to file excess pages for its reply to the Motion to Dismiss on grounds. The Court grants the Motion for Leave to File Excess Pages, and has reviewed the United States' entire reply to the Motion to Dismiss in deciding the Motion to Dismiss.

1 **IV. Motion to Dismiss for Lack of Subject Matter Jurisdiction**

2 The United States, as a sovereign, is immune from suit. *United States v. Mitchell*, 445
 3 U.S. 535, 538 (1980). “It is axiomatic that Congressional waiver of sovereign immunity is a
 4 prerequisite to any suit brought against the United States.” *Roberts v. United States*, 498 F.2d
 5 520, 525 (9th Cir. 1974). The United States “may not be sued without its consent and the
 6 terms of such consent define the court’s jurisdiction.” *Baker v. United States*, 817 F.2d 560,
 7 562 (9th Cir. 1987). A federal district court only has subject matter jurisdiction over a suit
 8 against the United States when sovereign immunity has been waived. *Amerada Hess Shipping*
 9 *Corp.*, 488 U.S. at 435. A waiver of sovereign immunity as contained in any statute “will be
 10 strictly construed, in terms of its scope, in favor of the sovereign.” *Lane v. Pena*, 518 U.S.
 11 187, 192 (1996). “A party bringing a cause of action against the federal government bears the
 12 burden of showing an unequivocal waiver of immunity.” *Baker*, 817 F.2d at 562.

13 A. Motion to Dismiss Pursuant to Rule 12(b)(1)

14 The United States contends that Rule 12(b)(1) of the Federal Rules of Civil Procedure
 15 is the proper vehicle for bringing the instant Motion to Dismiss because, regardless of whether
 16 a defendant has filed a responsive pleading, “[t]he issue of subject matter jurisdiction may be
 17 raised at any time, even on appeal.” *Mot. to Dismiss*, p. 2-3.

18 Plaintiffs contend that “Rule 12(b) states, quite clearly, that a motion asserting a defense
 19 of a claim, including subject matter jurisdiction and failure to state a claim, must be made
 20 before pleading if a responsive pleading is allowed.” *Opposition*, p. 2. Plaintiffs contend that
 21 “[s]ince the Defendant has waived their grounds for a Rule 12(b) motion, they are basically
 22 left with a Rule 12(c) motion, or a Rule 56 summary judgment motion, for their arguments on
 23 lack of jurisdiction.” *Id.* at 4.

24 As previously discussed, issues regarding subject matter jurisdiction may be raised at
 25 any time, even on appeal, by motion or sua sponte by the court. Fed. R. Civ. P. 12(h)(3); *Snell*
 26 *v. Cleveland*, 316 F.3d 822, 826-27 (9th Cir. 2002). The United States’ Motion to Dismiss
 27 under Rule 12(b)(1) is proper even though the United States has filed a responsive pleading
 28 in this case because such a motion may be brought at any time. The Court concludes that the

1 Motion to Dismiss pursuant to Rule 12(b)(1) is proper.

2 B. The Suits in Admiralty Act

3 The United States contends that Plaintiffs fail to address the Court's holding in its
4 January 15, 2008 order that the SAA is not a valid basis for subject matter jurisdiction over this
5 action because discretionary function exception to the SAA's waiver of sovereign immunity
6 applies. The United States contends that this failure "is fatal to any attempt to resurrect their
7 action." *Mot. to Dismiss*, p. 2.

8 Plaintiffs contend that the "United States has in admiralty cases waived sovereign
9 immunity and gave private owners and operators of vessels the same right of recovery from
10 the government for damages caused by public vessels which they would have against a private
11 shipowner or operator." *Opposition*, p. 9. Plaintiffs contend that the discretionary function
12 exception to the United States' waiver of sovereign immunity does not apply to this action.

13 The SAA provides that "[i]n a case in which, if a vessel were privately owned or
14 operated, or if cargo were privately owned or possessed, or if a private person or property were
15 involved, a civil action in admiralty could be maintained, a civil action in personam may be
16 brought against the United States or a federally-owned corporation." 46 U.S.C. § 30903.
17 However, a well-recognized exception to the SAA's general waiver of the sovereign immunity
18 is the "discretionary function" exception. *Earles v. United States*, 935 F.2d 1028, 1032 (9th
19 Cir. 1991).

20 The Court's January 15, 2008 order concluded that "Plaintiffs have failed to establish
21 subject matter jurisdiction under the SAA because the discretionary function exception applies,
22 retaining sovereign immunity." (Doc. # 27, p. 8-9). The FAC does not allege additional facts
23 with respect to the SAA. Plaintiffs' opposition to the instant Motion to Dismiss restates the
24 arguments made in their opposition to the United States' initial motion to dismiss with respect
25 to why the discretionary function should not apply to this action. The Court already considered
26 and rejected these arguments in the January 15, 2008 order. The Court concludes that the SAA
27 is not a valid basis for subject matter jurisdiction because the discretionary function exception
28 to the United States' waiver of sovereign immunity under the SAA applies, retaining the

1 sovereign immunity of the United States under the SAA.

2 C. The Public Vessels Act

3 The United States contends that the PVA “contains a condition precedent to any
4 consideration as to whether the PVA may waive sovereign immunity. Unless plaintiffs satisfy
5 this reciprocity requirement, the PVA can not waive sovereign immunity in actions by foreign
6 nationals.” *Mot. to Dismiss*, p. 9. The United States further contends that whether Plaintiffs
7 satisfy the reciprocity requirement is immaterial because “satisfaction of the [reciprocity]
8 requirement does not create jurisdiction otherwise barred by the PVA.” *Id.* at 9, 11.

9 Plaintiffs contend that they have demonstrated reciprocity under the PVA because “[t]he
10 Country of Ecuador in its constitution specifically includes the rights of all persons . . . and
11 basically has an open courts doctrine for any wronged inhabitant . . . and by definition grants
12 to citizens of any country including the United States, the same rights to pursue remedies in
13 its courts for personal injury or death to the same extent it grants its own citizens those rights.”
14 *Id.* at 11.

15 The PVA waives sovereign immunity in admiralty actions for “damages caused by a
16 public vessel of the United States.” 46 U.S.C. App. § 781. Pursuant to the “reciprocity”
17 provision of the PVA, nationals of a foreign country “may not maintain a civil action under this
18 chapter . . . unless it appears to the satisfaction of the court in which the action is brought that
19 the government of that country, in similar circumstances, allows nationals of the United States
20 to sue in its courts.” 46 U.S.C. § 31111; *see also United States v. United Continental Tuna*,
21 560 F.2d 569 (9th Cir. 1977). The plaintiff must demonstrate reciprocity, which is required
22 for sovereign immunity to be waived under the PVA. *United States v. United Continental*
23 *Tuna Corp.*, 425 U.S. 164 (1976).

24 Plaintiffs submitted the declaration of Ecuadorian attorney Villagran to demonstrate
25 reciprocity. Villagran attests that according to the Constitution of Ecuador, “there is no
26 discrimination against people from other countries, and there is not any restriction to a foreign
27 person to file a lawsuit in our country This means that a foreign person, company or
28 entity is able to file a lawsuit against an Ecuadorian person, company or entity.” *Villagran*

1 *Decl.*, p. 1. However, Plaintiffs do not allege or submit any evidence to demonstrate that
 2 Ecuador waives its sovereign immunity in admiralty actions brought in Ecuador's courts by
 3 foreigners for damages caused by a public vessel of Ecuador. The Court concludes that the
 4 PVA is not a valid basis for subject matter jurisdiction because Plaintiffs have not
 5 demonstrated reciprocity, which is a jurisdictional prerequisite to the waiver of sovereign
 6 immunity under the PVA.

7 C. United Nations Convention on the Law of the Sea

8 The United States contends that the United Nations Convention on the Law of the Sea
 9 ("UNCLOS") is "not entitled to status of a treaty or statute, and can not waive, and has not
 10 waived, sovereign immunity of the United States" because the United States has not ratified
 11 the UNCLOS. *Mot. to Dismiss*, p. 14-15.

12 Plaintiffs contend:

13 The [United States] seems to make a big deal out of the fact that the [United
 14 States] never signed the Law of the Sea Treaty. What counsel for the
 15 government does not tell the court is that the United States has a statute that
 16 covers the exact situation of Americans interfering with foreigners or for
 17 wrongfully boarding their ships, etc. 21 U.S.C.S. § 904 . . . authorizes the
 18 Attorney General of the United States to pay tort claims in the manner
 19 authorized by the F.T.C.A. when such claims arise in a foreign country in
 20 connection with drug enforcement abroad.

21 *Opposition*, p. 18.

22 A treaty that has not been ratified does not give rise to an individually enforceable right.
 23 *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1 (1821); *see Garza v. Lappin*, 253 F.3d 918, 925
 24 (7th Cir. 2001) (when the United States has signed, but not ratified, an international agreement,
 25 the agreement "does not yet qualify as one of the 'treaties' of the United States that creates
 26 binding obligations"). The United States has not ratified the United Nations Convention on
 27 the Law of the Sea. *United States v. Alaska*, 503 U.S. 569 (1992). The Court concludes that
 28 the UNCLOS is not a valid basis for subject matter jurisdiction because it has not been ratified
 and therefore Plaintiffs do not have an individually enforceable right under the UNCLOS.

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1 D. Alien Tort Act

2 The United States contends that the ATA “has been interpreted as a jurisdictional
3 statute only - it has not been held to imply any waiver of sovereign immunity.” *Mot. to*
4 *Dismiss*, p. 13 (internal quotations omitted). The United States contends that the ATA is not
5 a valid basis for subject matter jurisdiction because it does not waive the sovereign immunity
6 of the United States.

7 Plaintiffs contend that the ATA waives the sovereign immunity of the United States.
8 Plaintiffs contend that the United States has violated the law of nations by illegally seizing
9 Plaintiffs’ vessel, illegally seizing the Plaintiffs and imprisoning them, and illegally searching
10 Plaintiffs, which “thereby gives Plaintiffs a remedy under the ATA.” *Opposition*, p. 17.

11 The ATA “does not provide a waiver of sovereign immunity.” *Industria Panificadora*
12 *S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992). The ATA “has been interpreted as
13 a jurisdictional statute only - it has not been held to imply any waiver of sovereign immunity.”
14 *Goldstar (Panama) S.A. v. United States*, 967 F.2d 956, 968 (4th Cir. 1992). The Court
15 concludes that the ATA is not a valid basis for subject matter jurisdiction because it does not
16 waive the sovereign immunity of the United States.

17 E. “Specific Treaty Between Ecuador and the United States” Dated November 12,
18 1999

19 The United States contends that the November 12, 1999 “treaty” (“November 12
20 Agreement”) referred to by Plaintiffs does not provide a basis for subject matter jurisdiction.
21 First, the United States contends that the November 12 Agreement does not apply on its face
22 to maritime boarding and searches because it “is an agreement to provide for the use of an Air
23 Force Base in Manta, Ecuador, for aerial counter-narcotics activities.” *Mot. to Dismiss*, p. 15.
24 Second, the United States contends that the November 12 Agreement makes “no mention of
25 waivers of sovereign immunity, private rights of action or jurisdiction of courts of the United
26 States.” *Id.* at 15-16. Third, the United States contends that the November 12 Agreement is
27 a bilateral agreement, not a treaty ratified by the Senate and therefore is “not a legislative act
28 capable of waiving sovereign immunity, nor was it intended to be.” *Id.* at 16.

1 Plaintiffs contend that the United States and Ecuador “entered into a bilateral agreement
2 concerning the use of certain facilities on Manta, Ecuador for the use of [the United States].”
3 *Opposition*, p. 13. Plaintiffs contend that the November 12 Agreement contains an indemnity
4 provision “whereby the [United States] would pay for its mistakes resulting in claims by third
5 parties.” *Id.* Plaintiffs contend that the November 12 Agreement is a “maritime contract” and
6 creates an “obligation enforceable in admiralty and any dispute concerning the set of
7 obligations can be litigated in the federal courts.” *Id.* at 14. Plaintiffs contend that the
8 November 12 Agreement waives the United States’ sovereign immunity because “in admiralty
9 [Plaintiffs] could have brought an action against any individual or corporation who destroyed
10 his fish by illegally stopping and appropriating his boat. So too can he bring an action against
11 the U.S. government for this illegal action which then must be brought in admiralty;” and “tort
12 claims and immunity from suit are not a one statute act. Rather as the U.S. Supreme Court
13 stated, it should be construed to fit into the entire statutory system of remedies against the
14 government to make it workable, consistent and equitably whole.” *Id.* at 15.

15 The November 12 Agreement is entitled in full: “Agreement of cooperation between
16 the government of the United States of America and the government of the Republic of
17 Ecuador concerning United States access to and use of installations at the Ecuadorian Air
18 Force Base in Manta for aerial counter-narcotics activities.” *Mot. To Dismiss*, Exhibit 1. As
19 previously discussed, a waiver of the sovereign immunity of the United States must be
20 “unequivocal.” *Franconia Assoc. v. United States*, 536 U.S. 129 (2002). “[A] decision to
21 create a private right of action is one better left to legislative judgment” and courts are reluctant
22 to infer a private right of action unless the legislature supplies one expressly. *Sosa v. Alvarez-*
23 *Machian*, 542 U.S. 692, 727 (2004). Even if the November 12 Agreement applied to maritime
24 boarding and searches and created a private right of action, the November 12 Agreement does
25 not contain a waiver of the sovereign immunity of the United States. The Court concludes that
26 Plaintiffs have failed to demonstrate that the November 12 Agreement is a valid basis for
27 subject matter jurisdiction because the November 12 Agreement does not waive sovereign
28 immunity of the United States.

F. International Covenant on Civil and Political Rights

The United States contends that the ICCPR does not provide a waiver of the sovereign immunity of the United States because the ICCPR does not provide a private right of action, individual standing or subject matter jurisdiction.

Plaintiffs contend that the United States’ “conduct violates international standards of human rights and is in itself a waiver of sovereign immunity.” *Opposition*, p. 17. Plaintiffs contend that the ICCPR “covers illegal detention [and] cruel and inhuman treatment.” *Id.* at 18.

A treaty ratified by the Senate can only be enforced in the courts if it is self-executing or if implementing legislation has been passed. *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976). The ICCPR is not self-executing and Congress has not passed implementing legislation. *Hawkins v. Comparet-Cessani*, 33 F. Supp. 2d 1244, 1257 (C.D. Cal. 1999); *Jama v. INS*, 22 F. Supp. 2d 353, 364-65 (D.N.J. 1998). The ICCPR “does not create a private right of action or separate form of relief enforceable in the United States courts.” *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 137 (2d Cir. 2005). The Court concludes that Plaintiffs have failed to demonstrate that the ICCPR is a valid basis for subject matter jurisdiction because the ICCPR does not create a private right of action enforceable in the United States courts.

V. Motion for Leave to File Second Amended Complaint

Plaintiffs move the Court for leave to file a SAC on grounds that “additional facts have come to light and the pleadings need to match the facts.” *Mot. to Amend*, p. 1. Plaintiffs attached the proposed SAC to the Motion to Amend. The SAC alleges that this Court has jurisdiction “[u]nder 10 U.S.C. 2734, 49 C.F.R. 1.46(b) as payable as incident to non combatant activity of the U.S. Coast Guard.” SAC, p. 2. Other than alleging this additional ground for jurisdiction, the SAC is essentially identical to the FAC.

The United States opposes the Motion to Amend on grounds that the Motion to Amend is procedurally deficient because Plaintiffs failed to state in either a memorandum or declaration what the “additional facts” that have come to light might be. *Mot. to Amend*, p. 2. The United States further opposes the Motion to Amend on grounds that amending the FAC


1 would be futile because neither 10 U.S.C. section 2734 nor 49 C.F.R. 1.46(b) provide a basis
2 of jurisdiction.

3 “A district court does not err in denying leave to amend where the amendment would
4 be futile.” *Deveraturda v. Globe Aviation Security Services*, 454 F.3d 1043, 1044-46 (9th Cir.
5 2006). As previously discussed, a district court only has subject matter jurisdiction over a suit
6 against the United States when the United States has waived its sovereign immunity. *Argentine*
7 *Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 (1989). Neither the 10 U.S.C.
8 section 2734 nor 49 C.F.R. section 1.46 provide any waiver of the United States’ sovereign
9 immunity. Other than this additional jurisdictional basis, the SAC alleges the same
10 jurisdictional bases as the FAC, which the Court has determined are insufficient. The Court
11 concludes that granting Plaintiffs leave to amend the FAC to add 10 U.S.C. section 2734 and
12 49 C.F.R. section 1.46 as bases for subject matter jurisdiction would be futile because neither
13 10 U.S.C. section 2734 nor 49 C.F.R. section 1.46 waives the sovereign immunity of the
14 United States. The Motion to Amend is denied.

15 Conclusion

16 IT IS HEREBY ORDERED that the (1) Motion to Strike Motion to Dismiss for Lack
17 of Jurisdiction Over Subject Matter (Doc. # 36) is **DENIED**; (2) Motion for Leave to File
18 Second Amended Complaint (Doc. # 39) is **DENIED**; (3) Motion for Leave to File
19 Supplemental Response to the Motion to Dismiss (Doc. # 44) is **GRANTED**; (4) Ex Parte
20 Motion for Leave to File Excess Pages for Reply Memorandum to the Motion to Dismiss (Doc.
21 # 45) is **GRANTED**; and (5) Motion to Dismiss for Lack of Jurisdiction Over Subject Matter
22 (Doc. # 31) is **GRANTED**. The above-captioned action is **DISMISSED**.

23 DATED: September 19, 2008

24 
25 **WILLIAM Q. HAYES**
26 United States District Judge
27
28